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Supreme Court, U.S.
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No. 04-320

In The Supreme Court of the United States

ANTHONY BOST, ET AL.,

Petitioners,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

1. Although three courts of appeals, including the Eleventh Circuit in a decision relied upon in the decision below, have recognized the conflict among them,[1] the Brief in Opposition of Federal Express Corp. asserts that the decision of that court below is consistent with the decisions of other circuits, and argues "the decision in *Edelman v. Lynchburg College,* 535 U. S. 106 (2002), refutes the Petitioners' assertion of a conflict among the circuits..." Brief in Opp. at 8-9. Yet, this Court in that decision decided only that the EEOC regulation is authorized and valid, expressly remanded to the Fourth Circuit for a decision on the employer's argument "that Edelman's letter was not a charge under the statute because neither he nor the EEOC treated it as one." 535 U.S. at 118-119. See Brief in Opp. at 8. On that issue, the courts of appeals are still in conflict. Pet. 10-12 and fn. 2 and 3.

The Brief in Opp. contains only a side reference to the regulations of the EEOC (Brief In Opp. at 8 and fn. 4, and does not contain the citation to the decision of the Fourth Circuit on remand in *Edelman v. Lynchburg College,* 300 F.3d 400 (4th Cir. 2002), although the only appellate decisions subsequent to this Court's ruling are that one and the decision of Eleventh Circuit below in this case, and the Petition shows the conflict between them. Petition at 10-12. In the decision below, the Court of Appeals for the Eleventh

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[1] The Court of Appeals below cited and adhered to its earlier decision in *Pijenburg v. West Georgia Health Systems, Inc.,* 255 F.3d 1304 (2001). Pet. A-10, 13. The pre-existing conflict was recognized in that decision at 255 F.3d at 1305. That conflict was also recognized in *Diez v. Minnesota Mining & Mfg. Co.,* 88 F.3d 672, 674-674 (88th Cir. 1996); and *B.K. B. v. Maui Police Dept.,* 276 F.3d 1091, 1102, fn. 2 (9th Cir. 2002).

Circuit acknowledges that the applicable EEOC regulations provide that charges "'must, at a minimum be in writing and name the prospective respondent and ...and generally allege the discriminatory act(s).'" (Pet. A- 7-8); but it holds that a writing in the form of an intake questionnaire and affidavit is not a "charge" within the meaning of the law, because "there is no evidence in the record that EEOC did anything in response to Bost's intake questionnaire and affidavit... of any misleading communication between Bost and EEOC" and because "an intake questionnaire is not intended to function as a charge." Pet. A-10 and 11.

By contrast, the Court of Appeals for the Fourth Circuit recognized that the regulation of the EEOC is governing. *Edelman v. Lynchburg College, supra,* 300 F.3d at 404-405; Pet. at 11-12. There is a recent conflict between the courts of appeals of the Eleventh and Fourth circuits, in addition to the longstanding conflict among the courts of appeals recognized by at least three courts of appeals. Pet. at 12.

That decision of the Fourth Circuit quotes from the language of the valid regulation of the EEOC, 29 C.F.R. 1601.12(b), and rejects the argument of the employer that "because EEOC did not assign it an EEOC number, forward a copy to the College..." or otherwise treat it as a charge, the first unsworn document was not a "charge." 300 F.3d at 404; Pet. at 11-12. It ruled that "The problems noted by the College are not deficiencies in the charge; they are failures of the EEOC to carry out its responsibilities" under the law. *Id.* 300 F.3d at 404-405. It therefore rejected the argument adopted by the Court below that EEOC's failure to carry out its responsibilities rendered the document a non-charge under the Act. See App. A-9-13.

A conflict between or among the U. S. courts of appeal is itself grounds for granting review. Rule 10(a), Rules of this Court; *Edelman v. Lynchburg College,* 535 U.S. 106, 111 and fn.4 (2002); and *Chevron v. Echazabal,* 536 U. S.

73, 76 (2002:); *Clackamas Gastroenterology Associates v. Wells,* 538 U. S. 440, 444 and fn. 3; 124 S. Ct. 1236, 1240 (2003); *General Dynamics Systems, Inc. v. Cline,* 540 U. S. 551, 124 S. Ct. 1236, 1240 (2004). Review under Rule 10(a) is appropriate. *Id.*

Petitioners agree with Respondent Federal Express that this Court "expressly did not reach" the question of whether EEOC's failure to give notice and otherwise treat the first writing as a charge, even though it satisfies the standards if the regulations of a "charge," deprives that document of its status as a "charge" under Title VII and the ADEA. Brief in Opp. at 8. *Edelman v. Lynchburg College,* 535 U.S. at 119. See, Pet. at10-11. Indeed, it is for that reason the Petition is based upon Rule 10(a) of this Court rather than Rule 10(c).

Respondent Federal Express acknowledges that EEOC receives "more than 80,000 charges a year" but it asserts that the number of charges "will exponentially increase" if the Petition is granted and the decision below is reversed. Brief in Opp. at 9. That statement suggests that many more initial writings of charging parties are received by EEOC and its cooperating agencies than are treated as charges. If true that statement would support a grant of the petition, because the charge filing procedures are designed to enable lay persons to submit complaints which will cause EEOC to give notice to employers and permit conciliation. See Pet. at 13-14; *EEOC v. Commercial Office Products Co.,* 486 U. S. 107, 123-124 (1988); *Oscar Mayer & Co. v. Evans,* 441 U. S. 750, 761 (1979).

In any event, at least four and probably five of the courts of appeals have decisions in conflict with the decision of the court of appeals below. Pet. at 11, fn. 2, and *EEOC v. Sears Roebuck and Co.,* 650 F.2d 14, 18 (2d Cir. 1981); and *Hodge v. The New York College of Podiatric Medicine,* 157

F. 3d 164 (2d Cir. 1998)(ADEA). Those five courts of appeals have already adopted the position advocated by the petitioners here, and they include some of the states with the largest number of inhabitants and employees. It is unlikely that there will be any substantial increase in the number of cases docketed by EEOC, but if there is any increase, it would further the intent of Congress.

Respondent Federal Express states that "all circuits consider facts surrounding a plaintiff's submission to EEOC in determining whether a submission constitutes a charge." It states that "The Fourth Circuit clearly did so" in *Edelman v. Lynchburg College, supra.*

While it is true that the Fourth Circuit in that case considered the circumstances of the writing of the initial letter it held to be a charge, it did not rule on the basis of intent or the corresponding case law. Instead, after quoting the language of the EEOC's regulation, the Court in that case noted that "The College does not challenge the status of the November 14 letter as a charge on the basis of its substantive content" and ruled that "the simple failure by the EEOC to carry out its statutory duties does not precludes a plaintiff's Title VII claim" *supra*, 300 F.3d at 404. The decision below is in conflict with the holding of the Fourth Circuit, 300 F.3d at 404-405.

The Fifth Circuit precedent cited under the ADEA in the Petition was *Foster v. National Bank*, 857 F.2d 1058 (1988). Pet. at 11. In that case, the charging party sent EEOC a short letter stating that Foster intended to bring a suit against the defendant Bank because he believed that he was discharged because of his age. The employer argued that the letter was not a charge, but the Fifth Circuit cited and quoted from the letter and the EEOC regulation under the ADEA, holding that the plaintiff had filed a "charge" because the document he filed with EEOC identified the parties and the kind of discriminatory practice alleged, as

required by the regulation, 29 C.F. R. 1626.6 and 8, *Foster v. National Bank, supra,* 857 F.2d at 1060. The Petition's assertion at 11, fn. 2 that there is a conflict between the decision below and the rulings of the Fifth Circuit and the Sixth Circuit is accurate.[2]

2. Respondent Federal Express has been on notice at least since October 1999 of the allegations of its couriers that it has engaged in a nation wide pattern of age discrimination against its couriers over the age of 40; and. placed on notice of Petitioner Bost's claims of such discrimination no later than early March 2001. Pet. at 5-6.

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[2] Federal Express also seeks to distinguish the decision of the Fifth Circuit in *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74 (5th Cir. 1982); and *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (Sixth Cir. 1974) on the ground that the court there discussed "the facts surrounding a plaintiff's submission to the EEOC. " Brief in Opp. at 9 and 10.In the *Price* case in the second paragraph of its discussion of the "Sufficiency of Charge" the Fifth Circuit cited and quoted from the regulation of the EEOC, 29 C. F. R. 1601.12(b). *Price, supra,* 687 F.2d at 77. It cited earlier Fifth Circuit precedent, including *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 462 (1969). Similarly, in *Price, supra,* the Fifth Circuit ruled that "... the form completed on January 10, 1979....informed the EEOC of the identity of the parties and described the alleged discriminatory conduct in enough detail to enable it to issue an official notice of charge, thus setting the administrative machinery in motion." 408 F.2d at 78. Similarly, the Sixth Circuit has long held that "He and the members of his class, should not be denied judicial relief because of circumstances beyond his control." *Thornton v. East Texas Motor Freight Co.*, 497 F.2d 416, 424 (6th Cir. 1974). Those cases are contrary to the decision below which holds that the failure of EEOC to perform it's duty to notify the employer Federal Express does deprive petitioners of the opportunity to obtain relief because of the EEOC's failure to provide the employer with notice of the charge. Pett. A 9-13

Yet the court of appeals ruled in effect that such notice was insufficient to toll the period of limitations. Pet. A 13-15. That ruling is incompatible with the decisions of courts of appeals for the Second, Third, Sixth and Tenth Circuits. Pet. 17-20. If the Court grants review on Question 1, it should also grant review on Question 2.

Federal Express argues that review should not be granted on Question 2,, because "no class was ever certified in this case or in the *Freeman* case." Brief in Opp. at 11. However, the ADEA, like the Fair Labor Standards Act, provides for a statutory right to a collective action by employees, and is not dependent on or governed by Rule 23, Fed. R. Civ. P. For that reason, if the defendant employer is placed on notice of an allegation of company wide age discrimination, any member of the class may join an existing suit or commence his own without the need to file additional charges. E. g., *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1056 (2d Cir. 1990); *Howlett v. Holiday Inn s Inc.*, 49 F.3d 189, 194 (6th Cir. 1995); *Foster v. Ruhrpumpen, Inc.* 365 F.3d 1191,1197-1198 (10th Cir. 2004).

For the reasons set forth in the Petition, and above, the Petition should be granted.

Respectfully submitted,

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November 19, 2004.